

REMARKS**Status of the Claims**

Claims 1-3, 5-22, 24-31, and 33-45 will be pending in the above-identified application upon entry of the present amendment. Claims 1-2, 5, 15-16, 20, 29, 36, and 43 have been amended. Claims 4, 23, and 32 have been cancelled herein. Claims 20-42 are currently withdrawn from consideration. As such, claims 1-3, 5-19, and 43-45 stand ready for further action on the merits. Support for the recitations in claim 1 can be found in claim 4 as well as Table 5 on page 9 of the present specification. Support for the recitations in claims 15-16 and 43 can also be found in Table 5 on page 9 of the present specification. Claims 2 and 43 have been amended to place the claims in better form for prosecution. Claim 5 has been amended to depend from claim 1. Claims 20, 29, and 36 have been amended to properly depend from their respective independent claims. Thus, no new matter has been added. Based upon the above considerations, entry of the present amendment is respectfully requested.

In view of the following remarks, Applicants respectfully request that the Examiner withdraw all rejections and allow the currently pending claims.

Issues under 35 U.S.C. § 112, second paragraph

Claims 2 and 43 are rejected under 35 U.S.C. § 112, second paragraph, as being indefinite. Specifically, the Examiner asserts that the term “and/or” in claims 2 and 43 is improper. Applicants respectfully traverse.

Claims 2 and 43 have been amended herein to overcome this issue. As such, Applicants respectfully request that the rejection be withdrawn.

Issues over the Cited References

1) Claims 1, 6, and 7 are rejected under 35 U.S.C. § 102(b) as being anticipated by or, in the alternative, under 35 U.S.C. § 103(a) as being obvious over Japikse ‘843 (US 3,425,843) as evidenced by Kirshmann.

2) Claims 2-3 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Japikse ‘843 as evidenced by Kirshmann in view of Unnithan ‘261 (US 5,932,261).

3) Claims 1, 4-6, 9-11, and 14 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Sessoms et al. '070 (US 3,851,070) in view of Melnick '830 (US 3,216,830).

4) Claims 12-13 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Sessoms et al. '070 and Melnick '830 in view of McGee.

5) Claims 7-8 and 17-19 are rejected under 35 U.S.C. § 103(a) as being obvious over Sessoms et al. '070 and Melnick '830 in view of Ashmead et al. '427 (US 4,725,427).

6) Claims 2-3 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Sessoms et al. '070 and Melnick '830 in view of Unnithan '261.

7) Claims 15-16 and 43-45 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Sessoms et al. '070 in view of Melnick '830 and Unnithan '261 as evidenced by McGee.

Applicants respectfully traverse. Reconsideration and withdrawal of these rejections are respectfully requested based on the following considerations.

Legal Standard for Determining Anticipation

“A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference.” *Verdegaal Bros. v. Union Oil Co. of California*, 814 F.2d 628, 631, 2 USPQ2d 1051, 1053 (Fed. Cir. 1987). “When a claim covers several structures or compositions, either generically or as alternatives, the claim is deemed anticipated if any of the structures or compositions within the scope of the claim is known in the prior art.” *Brown v. 3M*, 265 F.3d 1349, 1351, 60 USPQ2d 1375, 1376 (Fed. Cir. 2001). “The identical invention must be shown in as complete detail as is contained in the ... claim.” *Richardson v. Suzuki Motor Co.*, 868 F.2d 1226, 1236, 9 USPQ2d 1913, 1920 (Fed. Cir. 1989). The elements must be arranged as required by the claim, but this is not an *ipsissimis verbis* test, i.e., identity of terminology is not required. *In re Bond*, 910 F.2d 831, 15 USPQ2d 1566 (Fed. Cir. 1990).

Legal Standard for Determining Prima Facie Obviousness

MPEP 2141 sets forth the guidelines in determining obviousness. First, the Examiner has to take into account the factual inquiries set forth in *Graham v. John Deere*, 383 U.S. 1, 17, 148 USPQ 459, 467 (1966), which has provided the controlling framework for an obviousness analysis. The four *Graham* factors are:

- (a) determining the scope and content of the prior art;
- (b) ascertaining the differences between the prior art and the claims in issue;
- (c) resolving the level of ordinary skill in the pertinent art; and
- (d) evaluating any evidence of secondary considerations.

Graham v. John Deere, 383 U.S. 1, 17, 148 USPQ 459, 467 (1966).

Second, the Examiner has to provide some rationale for determining obviousness. MPEP 2143 sets forth some rationales that were established in the recent decision of *KSR International Co. v Teleflex Inc.*, 82 USPQ2d 1385 (U.S. 2007).

As the MPEP directs, all claim limitations must be considered in view of the cited prior art in order to establish a *prima facie* case of obviousness. See MPEP 2143.03.

Distinctions over the Cited References

Claim 1 has been amended by incorporating the subject matter of claim 4 wherein the protein food source is soy flour. Claim 4 was not included in the first two rejections noted above because Japikse '843 as evidenced by Kirshmann in view of Unnithan '261 fail to disclose soy flour. As such, these two rejections have been overcome and should be withdrawn.

With respect to the remaining rejections, the Examiner asserts that Sessoms et al. '070 disclose soy protein in the range of 20-35% (col. 3, lines 5-8). As amended, all of the independent claims recite that the food product comprises 0.48-15.48 wt% of soy flour. Thus, the range disclosed in Sessoms et al. '070 is outside the range of the present invention. Applicants respectfully submit that the other cited references do not overcome this deficiency.

To establish a *prima facie* case of obviousness of a claimed invention, all of the claim limitations must be disclosed by the cited references. As discussed above, Sessoms et al. '070 with the other cited references fail to disclose all of the claim limitations of independent claims 1, 15-16, and 43, and those claims dependent thereon. Accordingly, the combinations of references do not render the present invention obvious.

Furthermore, the cited references or the knowledge in the art provide no reason or rationale that would allow one of ordinary skill in the art to arrive at the present invention as claimed. Therefore, a *prima facie* case of obviousness has not been established, and withdrawal of the outstanding rejection is respectfully requested. Any contentions of the USPTO to the contrary must be reconsidered at present.

CONCLUSION


A full and complete response has been made to all issues as cited in the Office Action. Applicants have taken substantial steps in efforts to advance prosecution of the present application. Thus, Applicants respectfully request that a timely Notice of Allowance issue for the present case clearly indicating that each of claims 1-3, 5-19, and 43-45 are allowed and patentable under the provisions of title 35 of the United States Code.

Should there be any outstanding matters that need to be resolved in the present application, the Examiner is respectfully requested to contact Chad M. Rink, Reg. No. 58,258 at the telephone number of the undersigned below, to conduct an interview in an effort to expedite prosecution in connection with the present application.

If necessary, the Commissioner is hereby authorized in this, concurrent, and future replies to charge payment or credit any overpayment to Deposit Account No. 02-2448 for any additional fees required under 37 C.F.R. §§ 1.16 or 1.17; particularly, extension of time fees.

Dated: **JAN 14 2010**

Respectfully submitted,

By 
Paul C. Lewis
Registration No.: 43,368
BIRCH, STEWART, KOLASCH & BIRCH, LLP
8110 Gatehouse Road
Suite 100 East
P.O. Box 747
Falls Church, Virginia 22040-0747
(703) 205-8000
Attorney for Applicants